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NOV 17 2006

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA

BY [Signature]

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,

RORY L. WHIPPLE,
Bar No. 014093

RESPONDENT.

No. 05-1600, 06-0163

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

The State Bar filed a Complaint on May 16, 2006. Respondent filed an Answer on June 27, 2006.

FINDINGS OF FACT

At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on October 26, 1991.

Count I:

1. On or about March 23, 2004, Daniel K. Kassahn retained Respondent for a child custody matter. Kassahn paid Respondent \$1,500.00 as a retainer and signed a fee agreement dated March 23, 2004.

2. Kassahn received only one billing statement from Respondent. The billing statement, dated April 28, 2004, showed that Respondent billed \$150 in professional services against Kassahn's retainer, leaving a balance of \$1,350.

3. Thereafter, Kassahn claims he had difficulty communicating with Respondent. Kassahn claims that he repeatedly called, faxed and e-mailed Respondent, without success, and that at one point, mail was returned because Respondent had moved and provided no forwarding

1 address. Respondent disputes this allegation. Respondent asserts that he provided Kassahn with
2 a cell phone number, that Kassahn did contact him on the cell phone, and that the mail was
3 returned because Kassahn sent it to an old address although Respondent had told him of the new
4 address.

5 4. Respondent met with Kassahn twice during the period of representation, and each
6 time apologized and gave excuses for the reasons he had been so difficult to contact.
7 Respondent asserts that he met with Kassahn five times and was not difficult to contact, as
8 described above.

9 5. On or about March 31, 2005, Respondent attended a parenting conference with
10 Kassahn and Kassahn's wife. The Kassahns assert, (but Respondent denies) that Respondent
11 stated if the conference did not go favorably, he would object and move for an evidentiary
12 hearing. Respondent disputes the second sentence. Respondent asserts that only Mr. Kassahn
13 was present at the parenting conference; that the mediators said they would not make the change
14 requested by Mr. Kassahn but wished to negotiate a parenting contract, although it was Mr.
15 Kassahn's decision to leave.
16

17 6. The parties were not in agreement with the direction the conference was headed.
18 Respondent told the Kassahns that they may as well leave and he would simply object to the
19 parenting conference recommendation. Respondent disputes the second sentence. Respondent
20 asserts that Mr. Kassahn inquired what his options were and Respondent explained that he could
21 object to the recommendation.
22

23 7. Although Respondent filed for an extension to file an objection, he failed to file
24 an objection. The recommendation then became an order, which is adverse to Kassahn.
25 Respondent disputes part of the first sentence. Respondent asserts that he did not file for an
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1 extension to file an objection. Respondent further asserts that he did not receive the parenting
2 conference recommendation because it was sent to his former address. Because he did not
3 receive it, he did not file an objection. Respondent admits that he neglected to change his
4 address in Prescott with the mediators or the court.

5 8. On or about June 21, 2005, Kassahn wrote to Respondent indicating his concerns
6 and requested a refund of his retainer and the return of any paperwork related to his file.
7 Respondent admits this but affirmatively asserts that there was no paperwork in the file that
8 Kassahn did not already have, because it was Respondent's practice to copy the client with
9 everything. Respondent also states that his billing did not reflect that a refund was due to
10 Kassahn. However, Respondent admits that he did not inform Kassahn of this information.

11 9. On or about September 12, 2005, the State Bar received Kassahn's charge against
12 Respondent.

13 10. Kassahn stated that he was unable to afford another attorney and was attempting
14 to proceed with his case *pro per*.

15 11. By letter dated October 7, 2005, the State Bar's Attorney/Consumer Assistance
16 Program ("ACAP") forwarded Kassahn's charge to Respondent and requested an informal
17 response to the inquiry. Respondent failed to provide a response.

18 12. By letter dated November 2, 2005, ACAP sent Respondent a reminder, again
19 requesting a response to the inquiry. Respondent failed to respond.

20 13. By letter dated December 21, 2005, bar counsel sent Respondent a copy of
21 Kassahn's charge and requested a formal response. Respondent failed to provide a response.

22 14. By letter dated January 18, 2006, bar counsel sent Respondent a reminder, again
23 requesting a formal response to the charge. Respondent failed to respond.

15. On February 12, 2006, the Probable Cause Panelist issued a *Subpoena Duces Tecum* ordering the deposition of Respondent on March 9, 2006.

16. On or about March 7, 2006, Respondent called bar counsel and asked for a continuance, as his uncle had passed away.

17. On or about March 8, 2006, bar counsel called Respondent to discuss rescheduling the deposition. Respondent explained some personal issues and agreed to provide responses to the charges to file nos. 05-1600 and 06-0163.

18. On or about March 29, 2006, bar counsel again spoke to Respondent who promised to provide a response to the complaints by Friday, March 31, 2006.

19. Respondent failed to provide the promised responses.

20. Respondent's wife was injured in an automobile accident on March 23, 2006.

21. Respondent failed to act with reasonable diligence and promptness in representing a client, in violation of Rule 42, Ariz.R.S.Ct., ER 1.3.

22. Respondent failed to promptly comply with reasonable requests for information from his client, and to adequately communicate, in violation of Rule 42, Ariz.R.S.Ct., ER 1.4.

23. Respondent failed to withdraw from the representation when his physical or mental condition materially impaired his ability to represent the client and/or, upon termination of the representation, Respondent failed to take steps to protect the client's interests and to provide all of the client's documents and billing status or refund if due, in violation of Rule 42, Ariz.R.S.Ct., ER 1.16.

24. Respondent failed to furnish information or respond promptly to an inquiry or request from bar counsel for information relevant to the investigation of Respondent's conduct in violation of Rule 53(f), Ariz.R.S.Ct.

Count II:

1 25. On or about July 26, 2005, Cheryl L. Laster retained Respondent on behalf of
2 Charles L. Lake in a criminal matter. Laster paid Respondent \$4,000 as a retainer and signed a
3 fee agreement.

4 26. Respondent had agreed to file a writ of *habeas corpus* in or about September
5 2005. As of January 28, 2006, Respondent had not filed the agreed upon writ.

6 27. From on or about July 14, 2005, through on or about January 4, 2006, Laster
7 attempted to contact Respondent via telephone on forty separate occasions without success.
8 Laster received no response from Respondent to her phone calls. Respondent disputes this
9 allegation. Respondent asserts that he was in contact with Ms. Laster for at least the first 20
10 phone calls. Respondent admits that there may have been some calls after mid-October, 2005,
11 that he may not have returned. Respondent also states that he has already made efforts to correct
12 his communication issues through his contract with the LOMAP.
13

14 28. On or about January 31, 2006, the State Bar received Laster's charge against
15 Respondent. Laster requested a refund of her retainer.
16

17 29. By letter dated February 9, 2006, bar counsel sent Respondent a copy of Laster's
18 charge and requested a formal response. Respondent failed to provide a response.

19 30. On or about March 13, 2006, Laster informed the State Bar that when
20 Respondent did not respond to her charges, she sent him a certified letter of termination of
21 services. Respondent signed for the certified letter on February 22, 2006.
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23 31. Respondent failed to respond to Laster's termination letter.
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32. On or about March 8, 2006, bar counsel called Respondent to discuss rescheduling a deposition in file no. 05-1600. Respondent explained some personal issues and agreed to provide responses to the charges in file nos. 05-1600 and 06-0163.

33. By letter dated March 9, 2006, bar counsel sent Respondent a reminder letter again requesting a formal response to the charge. Respondent failed to provide a response.

34. On or about March 29, 2006, bar counsel spoke to Respondent who promised to provide responses to the charges by Friday, March 31, 2006.

35. Respondent failed to provide the promised responses.

36. Respondent's wife was injured in an automobile accident on March 23, 2006.

37. Respondent failed to act with reasonable diligence and promptness in representing a client, in violation of Rule 42, Ariz.R.S.Ct., ER 1.3.

38. Respondent failed to promptly comply with clients' reasonable requests for information, and to adequately communicate, in violation of Rule 42, Ariz.R.S.Ct., ER 1.4.

39. Respondent failed to withdraw from the representation when his physical or mental condition materially impaired his ability to represent the client and/or, upon termination of the representation, Respondent failed to take steps to protect the client's interests and to provide the client's documents and an accounting/billing or refund if applicable, in violation of Rule 42, Ariz.R.S.Ct., ER 1.16.

40. Respondent failed to furnish information or respond promptly to an inquiry or request from bar counsel for information relevant to the investigation of Respondent's conduct, in violation of Rule 53(f), Ariz.R.S.Ct.

CONDITIONAL ADMISSIONS

Respondent conditionally admits that his conduct, as set forth above, violated Rule 42, Ariz.R.S.Ct., specifically ERs 1.3, 1.4, 1.16, and Rule 53(f), Ariz.R.S.Ct. Respondent's admissions are being tendered in exchange for the form of discipline recommended below.

The State Bar conditionally agrees to drop the charges against Respondent for violations of Rule 42, ERs 1.2, 1.5 (because Respondent has refunded money to the clients in file nos. 05-1600 and 06-0163), 1.15, 8.1(b) (because Respondent's conduct regarding failure to respond is covered by the Rule 53(f) language) and Rule 53(d), Ariz.R.S.Ct. (for the same reason as provided with regard to 8.1(b)).

CONCLUSIONS OF LAW

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz. R. S. Ct., specifically:

Count I: ER's 1.3, 1.4, and 1.16

Count II: ER's 1.3, 1.4, and 1.16

ABA STANDARDS

ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

This Hearing Officer considered all four of the factors of ABA Standard 3.0 in determining the appropriate sanction warranted by Respondent's conduct. Specifically, this hearing officer considered the duty that Respondent violated, his mental state at the time, any actual or potential injury caused by Respondent's conduct. This officer also considered Standard 4.0 (Violations of

Duties Owed to the Client) and 7.0 (Violations of Duties Owed to the Profession).¹ Standard 4.0 provides:

4.4 Lack of Diligence

4.42 Suspension is generally appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect and causes injury or potential injury to a client, or

4.43 Reprimand (censure in Arizona) is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

Standard 7.0 provides:

7.0 Violations of Duties Owed to the Profession

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

7.3 Reprimand (censure in Arizona) is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

A. The duty violated

Respondent violated his duties to his clients by failing to act with reasonable diligence and

promptness; failing to promptly comply with reasonable requests for information; and, failing to withdraw from the representations when his physical or mental condition materially impaired his ability to represent clients and/or, upon termination of representation, failing to take the necessary steps to protect the clients' interests (by communicating with them regarding the status of their file and to provide an accounting or billing).

¹ 6.0 (Violations of Duties Owed to the Legal System) may also be relevant for the violation of court rules, but 7.0 seems more appropriate in this case.

Respondent violated his duty to the legal system and the profession by failing to furnish information or respond promptly to an inquiry or request from bar counsel for information relevant to the investigation of his conduct.

Respondent admits that his conduct, taken as a whole, has violated his duty to clients, the profession, and the legal system.

B. The lawyer's mental state

Respondent's conduct was negligent in failing to act with reasonable diligence and promptness in representing clients; failing to promptly comply with reasonable requests for information; and, failing to withdraw from the representations when his physical or mental condition materially impaired his ability to represent clients and/or, upon termination of representation, failing to take steps to protect the clients' interests by communicating the status of the file and providing an accounting/billing status.

The Hearing Officer finds that Respondent had a knowing state of mind in relation to his failures to respond to the State Bar. However, Respondent has introduced evidence that he was suffering from personal or emotional problems during the time of the State Bar's investigation, thereby mitigating his lack of cooperation.

C. The potential or actual injury caused by Respondent's conduct

There was potential injury to clients involved in all of Respondent's rule violations. In file 06-

0163, the client had paid for a writ of *habeas corpus*. While of course there is no certainty that the writ would have been successful, there must have been at least potential for success or presumably Respondent would not have accepted the case. In file no. 05-1600, Respondent's

1 failure to file an objection to the parenting conference recommendation became an order adverse
2 to the clients.

3 Respondent asserts that his conduct caused no actual harm to any client and exposed
4 is clients to minimal potential harm at worst, and that he refunded in full the fees paid to
5 him by the clients even though he performed work on the clients' behalf. The State Bar's
6 position is that Respondent's failure to diligently represent his clients exposed the clients to
7 significant potential injury. And, in addition, there was actual injury to the clients in both counts
8 because they did not have use of the fees paid to Respondent to seek substitute representation for
9 a period of time.

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11 The Hearing Officer then considered aggravating and mitigating factors in this case,
12 pursuant to *Standards* 9.22 and 9.32, respectively. Four (4) factors are present in aggravation:
13 9.22(a) prior disciplinary offenses, (b) a pattern of misconduct, (c) multiple offenses, (d)
14 substantial experience in the practice of law.

15 There are two (2) factors in mitigation, 9.32, (a) absence of a dishonest or selfish
16 motive, and (b) personal or emotional problems:

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18 *Standard* 9.22(c) -- a pattern of misconduct. Respondent has failed to diligently represent
19 and communicate with clients in file nos. 05-1600 and 06-0163 of this matter and received an
20 order of probation on February 1, 2006, for the same violations of the Rules of Professional
21 Conduct.

22 *Standard* 9.22(d) multiple offenses. Respondent failed to diligently represent and
23 communicate with clients in file nos. 05-1600 and 06-0163 of this matter and then failed to
24 respond to the State Bar.
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Standard 9.22(i) substantial experience in the practice of law. Respondent was admitted to practice law in Arizona on October 26, 1991 and has been practicing for 15 years.

The following factors should be considered in mitigation:

Standard 9.32(b) absence of a dishonest or selfish motive.

Standard 9.32(c) personal or emotional problems. Respondent has provided evidence of personal problems during the period of the misconduct. This evidence is submitted separately, with a request for it to be sealed from the public.

PROPORTIONALITY REVIEW

The Supreme Court has held in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*, 208 Ariz. 27 ¶ 33, 90 P.3d 764, 772, (2004). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

The most serious instance of misconduct in this case involves Respondent's neglect of the clients' representations and lack of adequate communication with clients.² The following cases are instructive concerning these types of misconduct.

² However, Respondent's failures to respond to the State Bar are also very serious. Disregard of the disciplinary process borders on contempt for the legal system, undermines the profession's efforts at self-regulation, and casts a shadow over the integrity of the justice system. *In re*

1 In *In re Stevens*, SB-03-0148-D, Stevens was censured by consent for violations of Rules 42,
2 Ariz.R.S.Ct., specifically, ERs 1.3, 1.4, 8.4(d) and Rule 51(h) Ariz.R.S.Ct., and his probation
3 was extended for six months that included participation in the State Bar's Law Office
4 Management Program ("LOMAP"). In this three-count case, Stevens failed to diligently
5 represent his clients, failed to adequately communicate with his clients, engaged in conduct
6 prejudicial to the administration of justice and failed to promptly respond to the State Bar's
7 inquiries and requests. Four aggravating factors were found: prior disciplinary offenses (two
8 informal reprimands), a pattern of misconduct, multiple offenses, and substantial experience
9 in the practice of law. One mitigating factor was found: absence of a dishonest or selfish
10 motive. Steven's mental state was found to be negligent.

11 In *In re Robinson*, SB-05-0014-D, Robinson was censured for violations of Rule 42,
12 Ariz.R.S.Ct., specifically, ERs 1.1, 1.3 and 1.4 and placed on probation for two years that
13 included participation in LOMAP. In this two-count case, Robinson failed to adequately
14 communicate with clients, failed to keep clients informed, failed to diligently, competently,
15 and promptly represent clients resulting in an adverse court order in one case. Three
16 aggravating factors were found: prior disciplinary offenses (the hearing officer noted that
17 because this respondent had already received two informal reprimands and a censure, a short-
18 term suspension may have been warranted), multiple offenses and substantial experience in
19 the practice of law. One mitigating factor was found: character or reputation. Robinson's
20 mental state was found to be negligent.
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Brown, 184 Ariz. 480, 483, 910 P.2d 631, 634 (1996). It is noted that failure to cooperate with a
24 discipline investigation, standing alone, could warrant a censure. In *In re Anderson*, SB-01-0173
25 (2001), the attorney received a censure for failing to respond to the discipline investigation in
26 two cases. There was no other misconduct in that matter. See also *In re Shaw*, Nos. 03-0263, et

1 In *In re McVay*, SB-03-0018-D, McVay was censured by consent for violations of Rule 42,
2 Ariz.R.S.Ct., specifically, ERs 1.3, 1.4, 1.15(b), 1.16(d) and 8.4(d), and placed on probation
3 for two years that included participation in LOMAP. In this three-count case, McVay failed
4 to act with reasonable diligence, failed to properly communicate with his clients, failed to
5 render an accounting of his fees when requested and failed to provide client documents upon
6 request. Three aggravating factors were found: prior disciplinary offenses (one informal
7 reprimand), multiple offenses and substantial experience in the practice of law. Two
8 mitigating factors were found: absence of a dishonest or selfish motive and full and free
9 disclosure to the disciplinary board or cooperative attitude toward proceedings. McVay's
10 mental state was found to be negligent.

11 In *In re Hatfield*, SB-04-0010-D, Hatfield was suspended by consent for 30-days, for
12 violations of Rule 42, Ariz.R.S.Ct., specifically, ERs 1.3, 1.4, 8.1(b) and 8.4(d) and Rule
13 51(h) and (i), Ariz.R.S.Ct., and placed on probation for two-years that included participation
14 in LOMAP and the State Bar's Member Assistance Program ("MAP"). In this five-count
15 case, Hatfield failed to adequately communicate with her clients, failed to diligently represent
16 her clients' interests, engaged in conduct prejudicial to the administration of justice and
17 failed to cooperate with the State Bar's investigation. Four aggravating factors were found:
18 prior disciplinary offenses, pattern of misconduct, bad-faith obstruction of the disciplinary
19 proceeding by intentionally failing to comply with the rules or orders of the disciplinary
20 agency and substantial experience in the practice of law. Five mitigating factors were found:
21 absence of a dishonest or selfish motive, personal or emotional problems, character or
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25 al., Disciplinary Commission Report (March 11, 2005) (citing *In re Galusha*, 164 Ariz. 503, 794
26 P.2d 136 (1990)).

1 reputation, mental disability or chemical dependency and remorse. Hatfield's mental state
2 was found to be knowing.

3 Respondent's conduct in this case is closer to the censure cases discussed above than it is
4 to the short-term suspension case. The Supreme Court "has long held that 'the objective of
5 disciplinary proceedings is to protect the public, the profession and the administration of
6 justice and not to punish the offender.'" *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d 600, 612
7 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)). The
8 Hearing Officer believes that the sanctions proposed here are consistent with these
9 principles.

10 11 RECOMMENDATION

12 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public
13 and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320
14 (1993). It is also the objective of lawyer discipline to protect the public, the profession and
15 the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another
16 purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20,
17 29, 881 P.2d 352, 361 (1994).

18 In imposing discipline, it is appropriate to consider the facts of the case, the American
19 Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and the
20 proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283,
21 286, 872 P.2d 1235, 1238 (1994).

22 Upon consideration of the facts, application of the *Standards*, including aggravating
23 and mitigation factors, and a proportionally analysis, this Hearing Officer recommends the
24 following:
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1. Respondent will receive a public censure for violating Rules 42, Ariz.R.S.Ct., specifically ERs 1.3, 1.4, 1.16, and Rule 53(f), Ariz.R.S.Ct.

2. Respondent shall undergo a Member Assistance Program ("MAP") assessment within 30-days of the final Judgment and Order in these matters, and enter into a therapeutic contract incorporating the recommendations of the MAP director or designee. Respondent shall comply with the probation agreement, the requirements of which constitute additional terms of probation. The term of the MAP contract shall run concurrently with the LOMAP contract that Respondent has already signed in a previous file.

3. Respondent shall pay all the costs incurred by the State Bar in connection with these proceedings, including the assessment by MAP. A statement of costs and expenses incurred by the State Bar to date in this disciplinary proceeding is attached hereto as Exhibit A.

4. In the event Respondent fails to comply with any of the foregoing terms, and the State Bar receives information about his failure, bar counsel will file a Notice of Non-Compliance with the disciplinary clerk. A hearing officer will conduct a hearing at the earliest practical date, but in no event later than 30-days following receipt of the notice, and will determine whether the terms have been breached and, if so, will recommend appropriate actions in response to the breach. The State Bar shall have the burden of proving non-compliance by clear and convincing evidence.

DATED this 17 day of November, 2006.

Sandra Slaton 

Sandra Slaton
Hearing Officer 8A

Original filed with the Disciplinary Clerk
this 17 day of NOV, 2006.

Copy of the foregoing mailed
this 20 day of NOV, 2006, to:

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by 